

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS
AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,617 and No. 16,710

699

ROBERT A. HARRIS
and
RIGGS INVESTMENT CORP.,

Appellants,

v.

WALTER N. TOBRINER,
President
JOHN B. DUNCAN
and
BRIG. GEN. F.S. CLARKE,
Board of Commissioners,
District of Columbia,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

Appellant Harris installed TV antenna lines in a metal conduit in a building owned by appellant Riggs. This installation was performed in a safe, workmanlike manner, and in compliance with the D. C. Electrical Code. Riggs previously had permitted telephone lines to be run in the same conduit. The District ordered the removal of the antenna lines, claiming violation of a section of the D. C. Electrical Code. After hearings before the D. C. Board of Appeals and Review, the District ruling was upheld in a decision rendered without findings or conclusions or a record of the hearings before said Board. Appellants brought this action in the District Court to review said determination and for declaratory judgment and injunctive relief. On a record consisting of the verified complaint and conflicting affidavits, the lower court granted summary judgment against appellants, and later denied reconsideration thereof.

In this context, where appellants assert the existence of genuine issues as to material facts involving the application, validity and appellees' interpretation of the D. C. Electrical Code regulations, which appellants assert bear no reasonable relationship to the factors of health, safety or public welfare, did the District Court err in granting summary judgment against appellants and in denying reconsideration thereof?

In the same context, the second question is whether the appellants are entitled to a de novo hearing before the lower court to determine the validity of the decision of the Board of Appeals and Review which failed to furnish a record of its proceedings, contrary to Organization Order No. 112 of the D. C. Code.

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

These are consolidated appeals from a summary judgment in favor of appellees granted by the United States District Court for the District of Columbia, and from an order of said Court denying appellants' motion for reconsideration thereof. The jurisdiction of this Court is based upon 28 U.S.C., Section 1291. The jurisdiction of the lower court is based upon Title 11, Section 301, et seq. of the D. C. Code (1951 Ed.) and 28 U.S.C., Section 2201.

STATEMENT OF CASE

The verified complaint filed below sought to review and set aside the decision of the D. C. Board of Appeals and Review, a declaratory judgment and injunctive relief (J.A. 2-9). The pertinent averments of the complaint follow.

In 1959, during the construction by appellant Riggs Investment Corp. of a multi-family apartment project on its property located at 5601-5609 2nd Street, N.E., in the District, the appellant Harris was employed to install metal conduits or raceways throughout the project. The telephone company was permitted by the owner, Riggs, to utilize these metal conduits to run their telephone lines to the various apartment units. Some time after completion and occupancy in 1960, appellant Riggs contracted with appellant Harris to install a master television antenna system, using these same metal conduits for lead-in antenna lines running to the various apartments in the project for the benefit of the tenants. This system was installed by appellant Harris in a safe, competent and workmanlike manner pursuant to the provisions of the 1957 D.C. Electrical Code. No application for a permit to install the TV antenna lines was filed by the appellants, because up to that time neither an application for a permit, nor a permit, nor an inspection by the District had been required. Indeed, appellant Harris had previously been advised by the District to that effect. Under the

Electrical Code, neither antenna lines nor telephone lines are required to be enclosed in metal conduits; these lines may be run fastened to walls or molding in any manner desired by the owner; and they may be run together or separately within less than two inches of each other in accordance with the Electrical Code, without being enclosed. Appellants also raised an issue of custom and practice, and estoppel as to the interpretation of the applicable provisions of the Electrical Code.

After the installation of the antenna lines had been completed, the D. C. Electrical Department advised appellant Harris that an inspection disclosed a violation of the Electrical Code, and ordered correction to be made within thirty days. Appellant Harris requested an opportunity for a conference, but this was not granted.

Thereafter, a timely appeal was filed with the Board of Appeals and Review, established in Part VIII of Reorganization Order No. 55, as amended. A hearing was held, testimony was taken, memoranda were filed, and the Board took the matter under advisement. No decision was reached, but the Board re-scheduled another hearing in February, 1961, when further evidence was offered. In March, 1961, appellant Harris received a decision from the Board which sustained the Department of Licenses and Inspections. A timely motion for reconsideration was filed and denied. All administrative remedies have been exhausted.

By Act of Congress of 1904, the Commissioners were authorized and empowered to make rules and regulations with regard to the production, use and control of electricity for light, heat and power purposes, not inconsistent with existing laws, as in their judgment will afford safety and convenience to the public.

Pursuant to a 1944 Act of Congress (Sec. 1-246, D. C. Code), the Commissioners were authorized to delegate such authority to administer the Electrical Code, as adopted and revised by the Commissioners, to the D. C. Director of Inspection, and the Director of Department of Licenses and Inspection.

The purpose of the 1957 Electrical Code is defined as ". . . the practical safeguarding of persons and of building and their contents, from electrical hazards arising from the use of electricity, or light, heat, power, radio, signaling and for other purposes." The Department of Licenses and Inspections purported to act against appellants under Section 8123.2 of Article 810 of the D.C. Electrical Code, which provides as follows:

"8123.2 Antennas and Lead-Ins - Indoors. Indoor antennas and indoor lead-ins shall not be run nearer than two inches to conductors of other wiring systems in the premises unless (1) such other conductors are in metal raceways or cable armor, or (2) unless permanently separated from such other conductors by a continuous and firmly fixed non-conductor such as porcelain tubes or flexible tubing."

Appellants aver that this section is either not applicable, or it is in conflict with other provisions of the Electrical Code; that it is ambiguous; that the interpretation is erroneous, arbitrary, capricious, and that appellees have exceeded their delegated authority; that this regulation bears no reasonable relationship to health, safety or public welfare; and that the uncontroverted and undisputed testimony submitted to the Board of Appeals and Review conclusively demonstrates that no factors of safety, health or public welfare are involved. In addition, appellants charge that the regulation is inapplicable, because they relied upon prior custom and practice in the installation of such TV antenna lines; that neither light, heat nor power are involved; that the interpretation and construction of this provision is grossly inequitable, unreasonable and without basis; that neither the industry nor the public had ever been apprised of such a construction or interpretation now being applied by the District; and that, finally, the ruling in question results in no corresponding benefit either to the owner of the building, the tenants, or to the public.

No answer to the complaint was filed. Instead, appellees moved to dismiss for failure to state a claim, or in the alternative, for summary judgment on the ground that there was no genuine issue as to any material

fact (J.A. 9). Four affidavits were filed in support of this motion (J.A. 10-13). The affidavit of John K. Burch, a Telephone Company employee, stated that he observed television lead-in wires in the conduit containing telephone wires; that he reported this to the inspector for the Department of Licenses and Inspections and made a formal complaint (J.A. 10). The affidavit of Herbert F. Reilly, another telephone company employee, stated that he went to the premises in question in June or July, 1960, on a repair call; that he received an electrical shock from the conduit in which telephone wires had been installed; that he observed a TV antenna lead-in wire entering this conduit, which he reported to Mr. Burch (J.A. 11). The affidavit of John W. Lewis, Chief, Electric Section, Department of Licenses and Inspections, states that in August, 1960, he received a complaint from Mr. Burch concerning the installation of the antenna lead-in wires in the conduit which housed the telephone lines, and he was informed that a telephone employee had received an electric shock; he contacted Mr. Harris and asked him to get in touch with Mr. Burch to work out a solution to their problem; that this was normal procedure in matters of this kind so that the problems can be worked out without intervention of the District of Columbia Government; that in September, 1960, "after Mr. Harris refused to cooperate in working out a solution for this problem with Mr. Burch", Mr. Lewis went to the premises with another inspector and found that the antenna lead-ins had been installed after the installation of the telephone wires; that a notice was sent to appellant Harris advising him to correct the alleged violation within 30 days; and that he appeared before the Board of Appeals and Review as a witness to testify to these facts (J.A. 11-12). The affidavit of D. C. Electrical Inspector Smith stated that in August, 1960, he went to the premises and found the TV antenna lines in the one-half inch raceway in which were the telephone lines; that a defect letter was sent to appellant Harris and a copy was sent to Mr. Burch of the telephone company and to the owners of the premises; and that he testified as a witness before the Board of Appeals and Review (J.A. 13).

Appellees filed their "statement of material facts as to which they contend there is no genuine issue" (J.A. 14-15), as follows: (1) Appellant Harris installed the TV lead-in wires in the metal raceway occupied by telephone wires; (2) the telephone company employee Reilly discovered this fact after receiving an electrical shock; (3) Mr. Reilly lodged a formal complaint with Mr. Lewis, Chief of the D. C. Electrical Section; (4) Messrs. Lewis, Smith and Burch observed this condition in August, 1960; (5) In September, 1960, after an unsuccessful attempt at settlement, Mr. Lewis sent a violation notice to Harris and requested compliance within thirty days; (6) An appeal was taken to the Board of Appeals and Review which held hearings; (7) On March 16, 1961, the Board of Appeals and Review notified Harris that the action of the Department of Licenses and Inspections was sustained; (8) That the Harris motion for reconsideration was denied; (9) And on May 17, 1961, the complaint of appellants was filed in the lower court.

Pursuant to local rule 9 (h) of the lower court, appellants filed their statement of genuine issues necessary to be litigated (J.A. 16) on the basis of the following material facts:

1. That the installation by Harris of the TV antenna lead-in lines in the metal conduits owned by appellant Riggs was performed in a competent and workmanlike manner, and in compliance with the D. C. Electrical Code.

2. That the Electrical Code does not require either telephone lines or TV antenna lines to be installed in a metal conduit.

3. That telephone and TV antenna lines may be run in an open fashion, that is, not in a metal conduit within less than two inches of each other in compliance with the D. C. Electrical Code.

4. That Section 8123.2 of said Code, if construed to prevent such an installation, is erroneous, unreasonable, arbitrary or capricious; that it is discriminatory, and in conflict with other Electrical Code provisions.

5. That this section of the Electrical Code, or the appellees' construction or interpretation thereof, does not promote, and bears no reasonable relationship to public health, safety or general welfare, and is, therefore, invalid.

6. That appellees and their subordinates are estopped from asserting that this section of the Electrical Code prohibits the installation in question.

The motion for summary judgment and to dismiss was argued before the lower court on July 5, 1961, at the conclusion of which the Court announced that summary judgment would be granted (J.A. 19). On July 11, 1961, prior to the entry of the Order granting summary judgment, appellants filed a motion for reconsideration (J.A. 17), and attached thereto the affidavit of appellant Harris (J.A. 17-19). This affidavit established the following: That Herbert F. Reilly, whose affidavit is described above (J.A. 11), is the same witness who testified before the Board of Appeals and Review in this case; that Reilly's testimony at the hearing was more complete and specific than his affidavit; Reilly testified before the Board that in July, 1960, he had been detailed to the premises involved on a repair call; he went to the basement where he came in contact with a metal conduit which he touched, receiving a slight static shock; that he noticed moisture or condensation on the conduit, which he attributed as the cause of the static shock; that he did not intend to convey the idea or impression that the static shock he received was in any way attributable to the presence of both telephone and TV lines in the conduit; and that when he went to the apartment of the complaining subscriber, he discovered the cause of the complaint to be an exposed telephone line across the threshold in that apartment. The Harris affidavit unequivocally offers to establish beyond doubt that there is no remote possibility of any danger or hazard in the installation involved, and that static shock received by the witness Reilly was in no way, directly or indirectly, related to or caused by the existence of the installation involved.

The Harris affidavit also states that the hearings before the Board of Appeals and Review were recorded by means of a recording machine; that appellant Harris attempted to play these records so as to transfer the recording to tape for the purpose of preparing a transcript of the hearings; but he found the testimony recorded to be unintelligible, either because the recording was defective or because, after the testimony was recorded, other sounds had been introduced into the recordings so as to make them unintelligible; and that the only intelligible recording was that of a hearing devoted only to argument of counsel and comments; that appellants' counsel had requested the Board of Appeals and Review to furnish a transcript of the testimony, which was not done, although the secretary to that Board stated that the recordings had been previously transcribed. Finally, the affidavit states that it is necessary for a proper understanding of the issues that the lower court review the testimony by examining a copy of the transcript of the hearing before the Board or grant a de novo hearing; otherwise, appellants' right to a full and fair hearing would be denied.

After the motion for reconsideration was filed, and without a hearing thereof, the lower court entered its Order of July 17, 1961, granting summary judgment (J.A. 19-20); and the notice of appeal was timely filed below. Some time later, on October 31, 1961, the lower court entered an order denying the motion for reconsideration (J.A. 21).

In order to eliminate any possible question concerning the timeliness of the original notice of appeal filed July 31, 1961, appellants filed another notice of appeal on November 2, 1961 (J.A. 21), which appeals from both the summary judgment of July 17, 1961, and the order of the lower court denying the motion for reconsideration entered on October 31, 1961. On November 20, 1961, appellants were granted leave of this Court to consolidate these appeals for filing of briefs and a single joint appendix, and for oral argument.

REGULATIONS INVOLVED

The 1957 Electrical Code, Rules and Regulations.

Article 810, Section 8123.2: *

"8123.2 Antennas and Lead-Ins — Indoors. Indoor antennas and indoor lead-ins shall not be run nearer than two inches to conductors or other wiring systems in the premises unless (1) such other conductors are in metal raceways or cable armor, or (2) unless permanently separated from such other conductors by a continuous and firmly fixed non-conductor such as porcelain tubes or flexible tubing."

D. C. CODE PROVISIONS INVOLVED

D. C. Code (1961 Ed.) Title 1 — Administration, Appendix.

Organization Order No. 112 — Board of Appeals and Review; Part I, Section D. Organization. Paragraph 2(d).

"Subject to the provisions of the second paragraph of Part II A (a) of the Reorganization Order No. 50, as amended, each Hearing Committee shall exercise the following functions:

* * *

(ii) In each case be responsible for the preparation and maintenance of an adequate record of its proceedings and, in the absence of a stenographic transcript, prepare a summary of the evidence and, after the parties have been afforded an opportunity to examine the same and to propose amendments thereto and corrections thereof which shall be acted upon by the Committee, officially approve the same.

(iii) In each case make findings of fact, conclusions of law and a decision.

(iv) File its findings of fact, conclusions of law and decision in each case with the Chairman, who shall transmit a copy thereof to each of the parties."

* The foregoing Section 8123.2 of the Electrical Code is the pertinent regulation involved. However, reference is made to other provisions of the Electrical Code in the Argument.

STATEMENT OF POINTS

The lower court erred in granting summary judgment in favor of the appellees and in denying appellants' motion for reconsideration.

SUMMARY OF ARGUMENT

Where genuine issues are presented by a verified complaint and affidavits, summary judgment should not be granted. The issues involve the validity and applicability of a provision of the Electrical Code, its relation to other provisions, the interpretation thereof in the light of prior custom and practice, and whether it bears any reasonable relationship to the factors of health, safety or public welfare. Appellants installed a TV antenna line, most adequately insulated, in a metal conduit neither owned nor installed by the telephone company, but which it utilized for telephone lines. No permit for such installation or inspection thereof has ever been required by the District in the past. TV antennas and telephone lines are not required to be enclosed in metal conduits by the Electrical Code, but may be run together or separately as desired by the owner. At the instigation of the telephone company, the District sought to prohibit the installation and to compel its removal. The Board of Appeals and Review upheld the District without findings. There are no factors of public health, safety or welfare involved. Section 8123.2 of the Electrical Code does not apply, or if construed to apply, it is unreasonable, arbitrary, capricious and contrary to past interpretation by the District, as well as prior custom and practice. Analysis of applicable provisions of the Electrical Code and the proffer by appellants of competent supporting evidence clearly demonstrates that the foregoing section is either invalid or does not require or support the interpretation now for the first time urged by the District. There is no rational basis for the action taken by the District consistent with the purpose and scope of the Electrical Code. The District's attempt to reverse their prior custom and practice is erroneous under these circumstances. Appellant challenges the regularity of

the proceeding conducted by the D. C. Board of Appeals and Review which held hearings but rendered no findings and refused to furnish a transcript of the hearings under questionable circumstances. The failure and refusal of the Board of Appeals and Review to furnish a transcript of the testimony is contrary to its own regulations. The lower court should be required to grant a de novo hearing and the summary judgment granted by the lower court against the appellants should be reversed, with appropriate directions for a hearing and a trial on the merits.

ARGUMENT

I

GENUINE ISSUES ARE INVOLVED CONCERNING THE APPLICATION AND INTERPRETATION OF CERTAIN REGULATIONS, THE EXISTENCE OF AMBIGUITIES OR CONFLICTS, WHETHER THERE IS ANY RELATION TO FACTORS OF HEALTH, SAFETY AND WELFARE, AND WHETHER ACTION TAKEN BY DISTRICT IS CONTRARY TO PAST PRACTICE.

The basic question presented, of course, is whether the lower court should have entered a summary judgment based upon the verified complaint and conflicting affidavits. The averments of the complaint alone are sufficient to establish that there are genuine issues of fact.

"There is a great difference between discovering whether there be an issue of fact and deciding such an issue. The affidavit can be used for the former purpose, but not for the latter. Thus, if a fact be averred in the complaint and contradicted in the affidavit, the latter version cannot be accepted by the court for the purposes of a motion to dismiss." (Farrall, et al. v. D. C. Amateur Athletic Union, 80 U.S. App. D.C. 396, 153 F.2d 647)

This Court on more than one occasion has held that it is incumbent upon the lower court not to resolve any existing factual issue, but to determine whether one or more genuine issues exist (Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F.2d 766), and the procedure of summary judgment cannot be substituted for a trial of the issues (Orvis v. Brickman, 90 U.S. App. D.C. 266, 196 F.2d 762; Wittlin v. Giacalone, 154 F.2d

20; United Meat Co. v. R.F.C., 85 U.S. App. D.C. 9, 175 F.2d 528; Minor v. Washington Terminal, 86 U.S. App. D.C. 71, 180 F.2d 10). The lower court should not attempt to adjudicate difficult or complicated legal issues, either of a private or public nature, by summary judgment upon an inadequate factual basis. In Pacific American Fisheries v. Mullaney, (CA 9th 1951, 191 F.2d 137), where an injunction was sought against the enforcement of a fishing license tax on the ground of unconstitutionality, that Court said:

"Because of the importance of the issues presented in this suit, we think that it is not one to be disposed of by summary judgment, even if proper motion for such judgment had been made or proper opportunity afforded for appropriate showing by affidavit or otherwise."

An analysis of the complaint and the affidavits conclusively demonstrates that there are genuine issues as to several material facts. Plaintiffs below aver that the installation under discussion was made in a safe, competent and workmanlike manner consistent with past practice and in accord with the applicable provisions of the Electrical Code. They assert that no permits have been required for such installations in the past, and no inspection had ever been made or required by the District prior to this installation because the Electrical Code is not applicable under these circumstances. In fact, neither antenna lines nor telephone wires were or are required to be enclosed in metal conduits under the Electrical Code; they could be run together or separately, fastened to walls or molding, concealed or exposed, as may be desired by the owner.

At the instigation of the telephone company, the District Department of Licenses and Inspections was persuaded for the first time in its history to claim a violation of Section 8123.2 of the Electrical Code. Appellants contend and offer to prove that the regulation (Section 8123.2, supra) is inapplicable; that the interpretation and construction contended for by the District is erroneous, arbitrary and capricious, unreasonable, and without basis; that it is ambiguous and in conflict with other provisions of the Electrical Code; that it bears no reasonable relationship to the factors of

of health, safety or public welfare; that the position of the District is contrary to custom and practice which appellants relied upon; and that, if construed or applied to this situation by the District, there is no corresponding benefit to the owner, the tenants, or to the public; and that these facts were conclusively established before the Board of Appeals and Review.

The affidavits filed in support of appellees' motion for summary judgment do not contradict the material averments of the complaint, even though the affidavit of Herbert F. Reilly seems to imply that an electrical shock he received might have been caused by this installation. Such an inference, standing alone, does not justify a summary judgment in the face of the uncontradicted and uncontroverted averments of the complaint. Even so, the Harris affidavit clearly establishes that the shock received by Reilly, according to his own testimony before the Board, was in no way attributable to the installation involved. Moreover, the Harris affidavit clearly offers proof beyond doubt that there is no danger or hazard or the remote possibility thereof in the installation under discussion (J.A. 17-19).

The test to determine the validity of building regulations in this jurisdiction is well-established. It was stated by this Court in Dunigan v. District of Columbia, (59 App. D.C. 384, 44 F.2d 892), as follows:

"It is settled law that, in order to be valid, building regulations must be reasonable and not arbitrary, and must have a tendency to promote the public health, safety, or general welfare; and, although a regulation may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power will be invalidated by the Courts. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169."

Thus the validity of Section 8123.2 and its application or construction in this case is squarely in issue, which involves not only an analysis

of the Electrical Code, but also expert testimony from qualified employees of the District and qualified electrical engineers who practice their profession under this Code.

There are various sections of the Electrical Code which would preclude the application of Section 8123.2, or the interpretation advocated by the District. The purpose of the Electrical Code is stated to be " . . . the practical safeguarding of persons and of buildings and their contents, from electrical hazards arising from the use of electricity or light, heat power, radio, signaling and for other purposes." Appellants offer to establish that there are no hazards involved in the installation under discussion, and that it meets every reasonable test as to safety.

This situation is not unlike that of the Electrical Contractors Association of the D. C. v. McLaughlin, et al., decided by the lower court in 1957 (153 F. Sup. 653). There the Commissioners had adopted a regulation requiring plans and specifications for proposed electrical installations in excess of 200 amperes to be prepared and signed by registered, professional electrical engineers. The lower court held that regulation to be illogical, unreasonable, arbitrary and capricious, because it bore no relationship to the factors of public health, safety or general welfare, resulting in discrimination against the electrical industry, and inevitable increased costs to the consuming public. The same reasoning and conclusion should be applied here.

II

EXAMINATION OF RELATED ELECTRICAL CODE REGULATIONS DEMONSTRATES NEED FOR TESTIMONY AS TO APPLICATION AND CONSTRUCTION THEREOF, AS WELL AS PAST PRACTICE.

There are a number of provisions of the Electrical Code which bear directly or indirectly upon the construction and interpretation of Section 8123.2, and which clearly demonstrate that the appellees have

misconstrued either its relevancy or its application.¹

An examination of the permit and inspection requirements of the Electrical Code discloses, for example, that neither permits nor inspection of TV antenna lines is required. Section 1141 provides:

"Permit Required. — Except as otherwise provided by law and as provided for emergency work in Section 1142.2, no wiring, equipment, or fixtures for electric light, heat or power purposes shall be installed in the District of Columbia without a permit therefor in writing issued by the Central Permit Section of the District of Columbia before any part of the work of installation thereof is begun." (Underscoring supplied)

The reference to light, heat and power purposes is repeated many times in the Code. It is underscored by Section 1142.1:

"Application for permits to install wiring, apparatus and fixtures for light, heat and power purposes shall be filed in writing at the Central Permit Section, Department of Licenses & Inspections, on forms furnished by them, before any part of the work of installation thereof is begun." (Underscoring supplied)

The Code also speaks of permits being required for "Electrical Systems" and "Electrical Work", as in Section 1143.1:

"Plans and specifications showing in detail the electrical system to be installed in any building shall be submitted in each case as a part of the application for permit, if so required. (Underscoring supplied)

And under the heading of "Inspections", Section 1161.1 provides:

"When approval is desired of any electrical work for which a permit has been issued, the person, firm, or corporation by whom said work was installed shall deliver to the office of the Supt., Inspection Division, a request in writing for inspection thereof . . ." (Underscoring supplied)

¹ The D.C. Electrical Code, which is practically a carbon copy of the National Electrical Code, consists of some 440 pages, of which only 6 pages deal directly with radio and telephone equipment under Article 810.

Although a table of fees to be charged is provided for receiving stations of radio and television equipment under Section 1171, the appellants are prepared to establish, as they did before the Board, that in the history of the Department, as the District's own witness conceded, no fees have been charged for this work by the District.

Section 3011 of the Electrical Code provides:

"Conductors of telephone, telegraph, systems signal or radio systems shall not occupy the same enclosure with conductors of light or power systems . . ." (Underscoring supplied)

except under certain conditions not relevant here. Of course, the metal conduit involved in this case did not contain "light or power systems", but the Code clearly requires a separation of light and power wires from other wiring systems. So, while it may be argued that a telephone wire may not be enclosed in the same metal conduit as a light or power wire and, by the same token, that a TV antenna line may not be run in the same metal conduit containing a light or power wire, this is not to say that telephone and TV antenna lines may not be run in the same metal conduit. There is no sound or logical reason why telephone and TV antenna lines may not be run in the same conduit, which appellants are prepared to establish at a hearing before the lower court, as they did before the Board of Appeals and Review.

Chapter 8 of the Electrical Code deals with "Communication Systems". Sections 8012.1, 8012.11 and 8012.12 provide as follows:

"8012.1 Separation from Other Conductors. — Conductors shall be separated from conductors of electric light and power circuits as follows:

"8012.11 Open Conductors. — Conductors shall be separated at least 2 inches from any light or power conductors not in metallic raceways or metal-sheathed cable unless permanently separated from the conductors of the other system by a continuous and firmly fixed non-conductor, additional to the insulation on the wire, such as porcelain tubes or flexible tubing.

"8012.12 In Raceways and Boxes. — Communication conductors shall not be placed in any raceway, compartment, outlet box, junction box or similar fitting with conductors for light and power circuits or Class I signal and control circuits unless the conductors of the different systems are separated by a partition; provided, that this shall not apply to conductors in outlet boxes, junction boxes or similar fittings or compartments where such conductors are introduced solely for power supply to communication equipment or for connection to remote-control equipment." (Underscoring supplied)

So, it is obvious that the Code concerns itself with separating conductors of light and power circuits, and it is not concerned with separation of telephone and TV antenna lines, whether in or out of metal conduits. Section 8103 prohibits the erection of outdoor antennas within two feet of any electric light or power conductor, and Section 8112 prohibits outdoor antennas from crossing over electrical light or power circuits. The reasons for such prohibitions are obvious and reasonable. The fact that telephone and TV antenna wires may be run through a building without being enclosed in a metal raceway, however, as appellees conceded before the Board, only serves to underscore that there is no element of hazard or danger involved. By contrast, for example, Section 3011 of the Electrical Code dealing with light or power systems does require electrical wires to be enclosed, and light or power systems are even permitted in the same enclosure if the systems involve 600 volts or less; but they are required to be in separate or partitioned enclosures if more than 600 volts are involved. By comparison, telephone and TV antenna lines have such a minute energy output that it is measured in microvolts.

It is a recognized fact that the telephone company installs its conductors through dwellings and buildings by various wiring methods, depending upon the owner's desire and not upon any Electrical Code provision. The same is also true of TV antenna lines. The reason is basic: The total energy output in both is so infinitesimal as to be practically nonexistent; conduit systems for telephone and TV antenna lines are installed by builders and owners for esthetic reasons, so as to be concealed, and

not for reasons of safety or protection, because these factors are not at all involved. This has been recognized by the District of Columbia, and is the reason underlying the absence of any requirement for permits or inspections on this type of equipment. We do not contend that, because permits or inspections are not required, violations of the Electrical Code are permitted. On the contrary, it is precisely because there can be no violations of the Electrical Code under these circumstances that permits and inspections are not required. If anything, enclosing both the telephone and TV lines in a metal conduit provides greater safety than if they were run together unenclosed.

The fact of the matter is that there are no requirements in the Electrical Code for the installation of antenna lead-in lines of the kind involved here. For example, Article 110 of the Electrical Code provides that: "This Article includes provisions applicable generally in installations of electric wiring and equipment"; and under the heading of "Wiring Methods", it is provided:

"Only wiring methods recognized as suitable are included in this Code. Special types of wiring may be used only where recognized as suitable under this and other Articles of this Code. The recognized methods of wiring may be installed in any type of building or except as otherwise provided in this Code." (Underscoring supplied)

Consistently in the past, the phrase "other wiring systems" used in Section 8123.2 has been construed to mean systems dealing with light, heat or power, and not telephone or TV lines. Moreover, the rest of this section, which reads "... unless (1) such other conductors are in metal raceways or cable armor, or (2) unless permanently separated from such other conductors by a continuous and firmly fixed non-conductor such as porcelain tube or flexible tubing", does not apply to the telephone or TV antenna lines, since each are insulated and contained within flexible tubing or armor so as to be safe and free from any hazard; and is considered by experts to meet the highest standards of insulation for this type of line.

It is apparent that this subject matter is complex, depending as it must for clarification by expert testimony, as well as custom and practice, and that it cannot and should not be disposed of by summary judgment proceedings. If there are any real doubts, they should be resolved against the granting of summary judgment. (Dewey v. Clark, supra)

As previously stated, pursuant to Local Rule 9 (h)² of the lower court, defendants below filed a statement of material facts as to which they contend there is no genuine issue (J.A. 14-15); and appellants, pursuant to the same rule, filed their statement of genuine issues (J.A. 16). While this local rule may give the lower court the right to assume facts claimed by the moving party as admitted without controversy, except as and to the extent that such facts may actually in good faith be controverted in a statement opposing the motion, surely this does not enlarge upon Federal Rule 56 (c) so as to permit the lower court to resolve conflicting issues posed by the complaint and opposing affidavits.

² MOTIONS FOR SUMMARY JUDGMENT. In addition to the points and authorities required by part (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

III

IN THE ABSENCE OF A RECORD OF ADMINISTRATIVE PROCEEDINGS, DUE PROCESS REQUIRES A DE NOVO HEARING BEFORE THE LOWER COURT.

The Harris affidavit (J.A. 17-19) also raises a genuine issue as to the legality of the proceedings before the Board of Appeals and Review. Organization Order No. 112 establishing the Board of Appeals and Review (D.C. Code, 1961 Ed., Title 1 - Administration, Appendix, pp. 140-142) designates the Board as an administrative agency providing a final administrative remedy in cases assigned to it. A Hearing Committee of this Board is responsible for the preparation and maintenance of an adequate record and, in the absence of a stenographic transcript, it is required (a) to prepare a summary of the evidence, (b) afford an opportunity for the parties to examine the same and propose amendments thereto and corrections thereof, (c) to make findings of fact, conclusions of law and a decision. Here, appellants were not furnished with a copy of the record, nor a summary of the evidence; they were not afforded an opportunity to examine any transcript of proposed summary; the Hearing Committee and the Board failed and refused to make findings of fact and conclusions of law, and denied the request of appellant Harris for a copy of the transcript which apparently existed, according to his affidavit. Between May 9, 1961, the date of the final decision of the Board, and July 11, 1961, when the Harris affidavit was filed (J.A. 17), appellant Harris attempted to tape the records, but was unable to do so because they were unintelligible, either because they were defective, or because other sounds had been introduced into the recording subsequent to the hearings so as to make them unintelligible.

An action to review an administrative order generally is limited to a review of the record before the administrative tribunal (Minkoff v. Payne, 93 U.S. App. D.C. 123, 210 F.2d 689). However, where the administrative agency fails or refuses to furnish a record, appellants

submit that their right to an adequate consideration of their case for review has been seriously prejudiced.

In Washington Gas Light Co. v. Baker, (88 U.S. App. D.C. 115, 188 F.2d 11) this Court had occasion to observe that the D.C. Public Utilities Commission should keep in mind its obligation to facilitate judicial review of its orders and should assemble a record and make findings which cover all the relevant issues and should indicate the formula chosen, and should make clear the evidentiary support for its findings under whatever formula adopted. In the light of the language used in the Organization Order No. 112, it appears that the Board of Appeals and Review has no less an obligation to facilitate judicial review than does the Public Utilities Commission. The appellants are entitled at least to a record of the proceedings before the Board of Appeals and Review (Cf. Bowles v. Baer, CCA. Ill., 142 F.2d 787), which should be discouraged from any attempt at foreclosing appropriate judicial review of their actions. And in the absence of a record of the Board proceedings, it is incumbent upon the lower court to grant a de novo hearing and to afford the appellants a full opportunity to establish their right to relief from the action taken by the District and the Board.

Cf. Jordan v. American Eagle Fire Ins. Co., 83 U.S. App. D.C. 192, 169 F.2d 281.

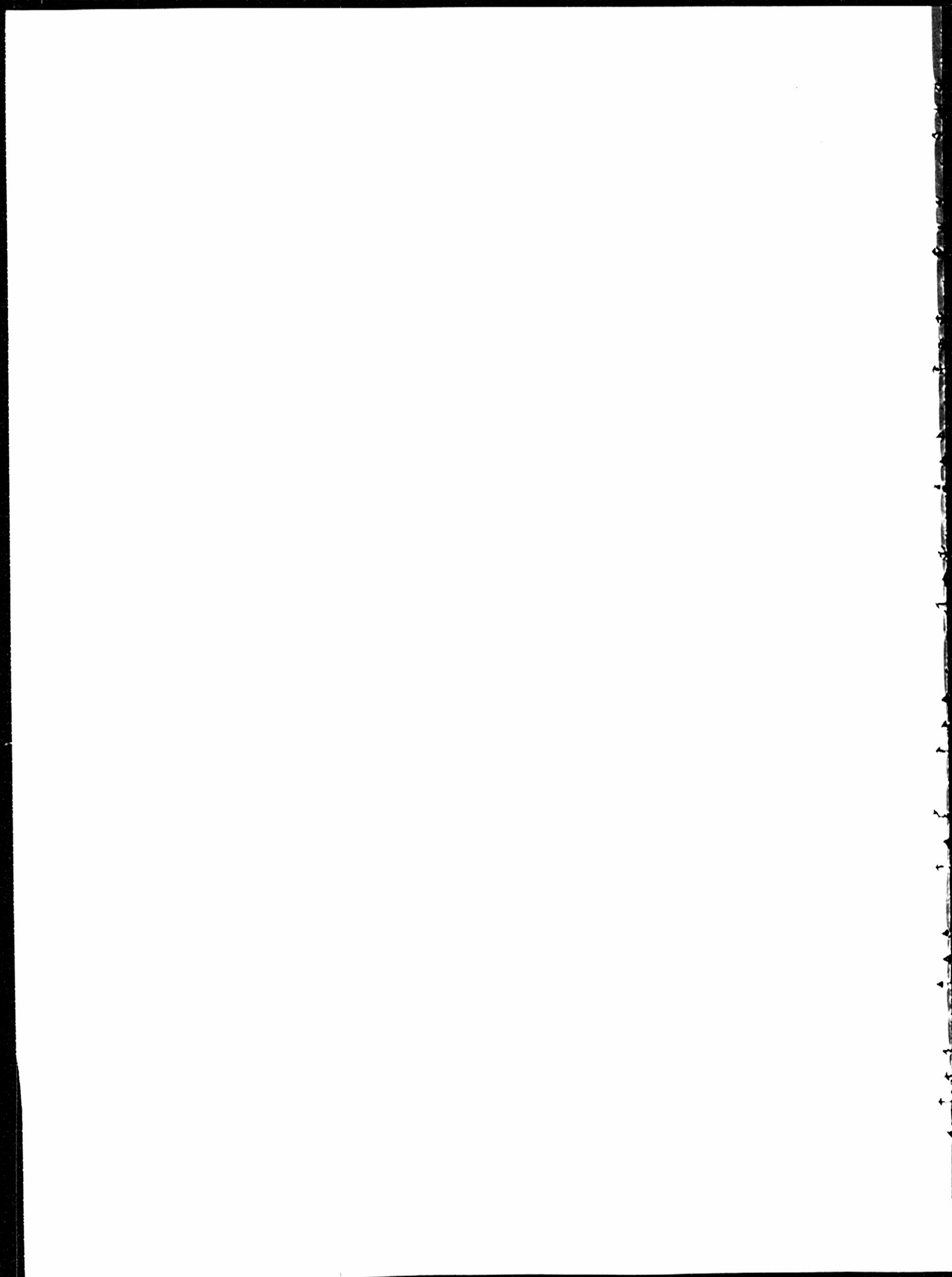
Columbia Auto Loan v. Jordan, 90 U.S. App. D.C. 222, 196 F.2d 568.

CONCLUSION

The judgments of the District Court should be reversed, with instructions to grant the appellants a trial and a hearing on the merits.

Respectfully submitted,

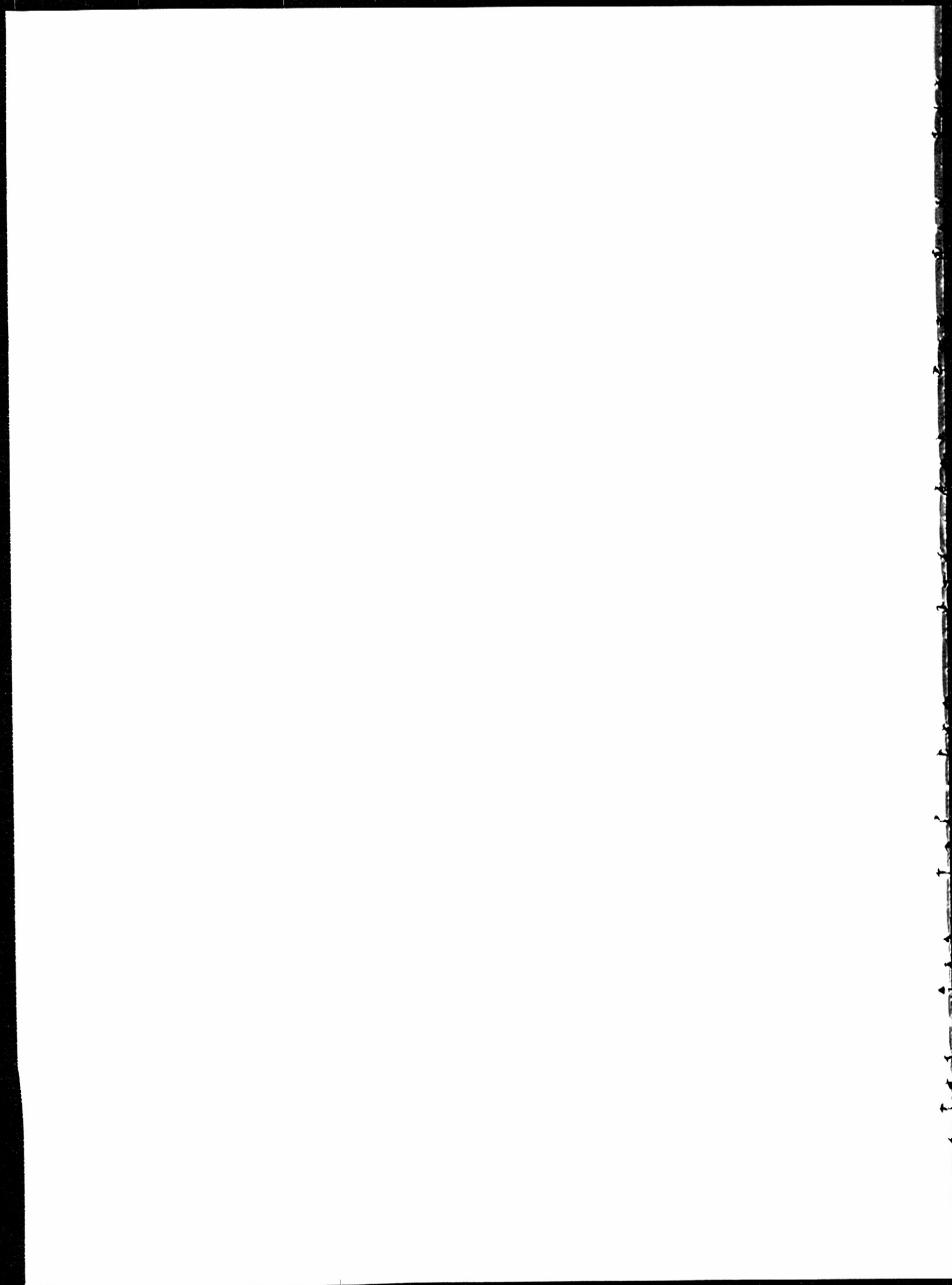
MAURICE FRIEDMAN
1001 Connecticut Avenue, N.W.
Washington 6, D. C.
Attorney for Appellants



(i)

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JOINT APPENDIX

[Filed May 17, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT A. HARRIS	:	
T/A Electrical Associates	:	
2021 M Street, N. W.	:	
and	:	
	:	CIVIL ACTION NO. 1510-61
RIGGS INVESTMENT CORP.	:	
A body corporate	:	
1700 Eye Street, N. W.	:	
Washington, D. C.	:	
Plaintiffs ,	:	
v.	:	
WALTER N. TOBRINER, President	:	
ROBERT A. McLAUGHLIN	:	
and	:	
BRIG. GEN. F. S. CLARKE	:	
Board of Commissioners	:	
District of Columbia	:	
Washington, D. C.	:	
Defendants .	:	

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>1961</u>	
May 17	Complaint, appearance; filed
May 17	Summons, copies (3) and copies (3) of Complaint issued: all ser 5/18/61
Jun. 7	Motion of defts to dismiss or for summary judgment; P&A; affidavits (4); c/m 7/6/61; MC 6/7/61; appearance of Chester H. Gray, John A. Earnest, Jr. and John F. Middleton; filed
Jun. 8	Statement of material facts by defts; c/m 6/8/61; filed
Jun. 15	Points and authorities of pltf's in opposition to defts motion to dismiss or for summary judgment; c/m 6/14/61; filed
Jun. 15	Statement of genuine issues by pltf; c/m 6/14/61; filed

- Jul. 11 Motion of pltfs for reconsideration; c/m 7/10/61; affidavit; memo; MC 7/11/61; filed
- Jul. 17 Order granting def't's motion for summary judgment. (N); Tamm, J.
- Jul. 31 Notice of appeal by pltfs from order 7/17/61; copies to Corp. Counsel. Deposit \$5.00 by Friedman; filed

[Filed May 17, 1961]

COMPLAINT TO SET ASIDE DECISION OF D.C. BOARD OF
APPEALS AND REVIEW, FOR DECLARATORY JUDGMENT AND
INJUNCTION

1. The jurisdiction of this Court is based upon Title 11, Section 301 et seq. of the District of Columbia Code (1951 Ed.) and Title 28, Section 2201 of the United States Code.

2. The plaintiff, Robert A. Harris, is a resident of the District of Columbia, duly licensed and bonded as an electrical contractor in the District of Columbia, and is engaged in the electrical contracting business under the trade name of Electrical Associates. The plaintiff, Riggs Investment Corporation, is a Delaware corporation, duly re-istered and doing business in the District of Columbia, and the owner of the real estate described herein, located at 5601-5609 - 2nd Street, N.E., in the District of Columbia.

3. The defendants, Walter N. Tobriner, Robert A. McLaughlin and Brig. Gen. F. S. Clarke, are sued in their capacity as members of the Board of Commissioners of the District of Columbia.

4. By an Act of Congress approved April 26, 1904, the Commissioners of the District of Columbia were authorized and empowered to make from time to time such rules and regulations respecting the production, use and control of electricity for light, heat, and power purposes in the District of Columbia not inconsistent with existing laws, as in their judgment will afford safety and convenience to the public.

5. By Act of Congress approved December 20, 1944 (58 Stat. 819, Sec. 1-246 D. C. Code 1951 Ed.), said Commissioners were

authorized and empowered to transfer to, impose upon, vest and delegate in the Director of Inspection of the District of Columbia and to the Director of the Department of Licenses and Inspections, full authority to control the installation, erection, maintenance and report of all such electric wiring and apparatus within the District of Columbia, and to administer the Electrical Code for the District of Columbia as adopted and revised from time to time by said Commissioners. Under date of August 14, 1957, by order of said Board of Commissioners, the rules and regulations of "The 1957 Electrical Code" were adopted by the said Board of Commissioners; and the construction, interpretation and applicability of certain of these rules and regulations described hereinafter are involved in this proceeding.

The purpose and scope of said 1957 Electrical Code are defined therein as follows:

"The purpose of this Code is the practical safeguarding of persons and of buildings and their contents, from electrical hazards arising from the use of electricity or light, heat, power, radio, signalling and for other purposes."

6. During 1959, a multiple family apartment building was erected on premises which are now known as 5601-5609 - 2nd Street, N.E., in the District of Columbia; and during the construction, metal conduits were installed for, on behalf of, and paid for by the plaintiff owner thereof, Riggs Investment Corporation. The Chesapeake and Potomac Telephone Company was permitted by the owner thereof to utilize said metal conduits for running telephone wires therein for use by the various tenants of said building. After the construction was completed and the premises occupied, and some time prior to September, 1960, the plaintiff owner of said property, Riggs Investment Corporation, contracted with the plaintiff, Robert A. Harris, for the installation of a master television antenna system utilizing said owner's metal conduits for lead-in antenna wires running to the various apartments in said project for the benefit of the tenants thereof; and said system was installed by the plaintiff, Robert A. Harris, in a safe, competent and workmanlike manner.

7. Prior to the installation of these antenna wires as aforesaid, no applications for permits had been required by the District of Columbia, or by its Department of Licenses and Inspections, and no permits had been issued for such work. On the contrary, the plaintiff, Robert A. Harris, had previously been advised by the Electrical Section of said Department that no application for a permit was required for such work, that such permits were not issued, and that no inspection was ever made or required of such work. Under said Electrical Code of 1957, neither antenna lines nor telephone wires were or are required to be enclosed in metal conduits.

8. On or about September 20, 1960, the plaintiff, Robert A. Harris, received a communication from the Chief of the Electrical Section of the District of Columbia Department of Licenses and Inspections, advising said plaintiff that an inspection of premises 5601-5609 - 2nd Street, N.E., disclosed a violation of Article 810, Section 8123.2 of the D.C. Electrical Code, and ordered corrections to be made within 30 days from the receipt of said notice. Said plaintiff replied to said notice, and requested an opportunity for a conference, which was not granted.

9. Promptly thereafter, said plaintiff, Robert A. Harris, filed his written notice of appeal to the Board of Appeals and Review, established in Part VIII of Reorganization Order No. 55, as amended on July 12, 1960. A hearing before said Board of Appeals and Review took place on October 20, 1960, at which time evidence was offered in support of said plaintiff's appeal, and on behalf of the Department of Licenses and Inspections in support of its order of September 29, 1960, above referred to. Thereupon, the hearing was concluded, memoranda were filed both on behalf of said plaintiff and on behalf of the Department of Licenses and Inspection, through the office of the Corporation Counsel for the District of Columbia, and said Board of Appeals and Review took the matter under advisement.

10. Said Board of Appeals and Review did not decide the case, but instead re-scheduled the appeal for another hearing before said Board of Appeals and Review, on February 23, 1961, and further testimony and evidence was adduced.

11. Under date of March 17, 1961, the plaintiff, Robert A. Harris, received a decision by registered mail, which was mailed on March 16, 1961, from the said Board of Appeals and Review, which rendered its "findings of fact and conclusions of law" as follows:

"The Board finds that there is a clear violation of Article 810, Section 8123.2 of the 1957 Electrical Code. The action of the Department of Licenses and Inspections is therefore sustained."

12. On or about March 17, 1961, the plaintiff, Robert A. Harris, filed his motion or petition for reconsideration with said Board of Appeals and Review, requesting that it reconsider its said decision, findings of fact and conclusions of law. By notice dated April 20, 1961, received by said plaintiff on May 9, 1961, said Board of Appeals and Review advised said plaintiff that said motion for reconsideration was denied.

13. The plaintiffs herein have exhausted their administrative remedies, and are without adequate remedy at law to challenge or otherwise obtain relief from the decision of the said Board of Appeals and Review except by this action; and unless this Court will grant the plaintiffs appropriate relief, the television antenna lines will be required to be removed from said building, and otherwise replaced at a substantial cost; otherwise, the plaintiff, Robert A. Harris, will be threatened with criminal prosecution by the District of Columbia for failure to comply with said order of the Department of Licenses and Inspections.

14. Said Section 8123.2 of Article 810 of the 1957 D. C. Electrical Code provides as follows:

"8123.2 Antennas and Lead-Ins - Indoors. Indoor antennas and indoor lead-ins shall not be run nearer than two inches to conductors of other wiring systems in the premises unless (1) such other conductors are in metal raceways or cable armor, or (2) unless permanently separated from such other conductors by a continuous and firmly fixed non-conductor such as porcelain tubes or flexible tubing."

15. Plaintiffs are advised and believe and, therefore, aver:

(a) That Article 810, Section 8123.2 of the 1957 Electrical Code, cited in Paragraph 14 above, is either not applicable to the work done and involved herein; or it is in conflict with other provisions of the 1957 Electrical Code; it is ambiguous; and if the interpretation thereof placed upon it by the defendants and its subordinates is correct, then said section is arbitrary, capricious, and the defendants and their subordinates have exceeded the power and authority delegated to them by Congress in adopting and promulgating that section or the interpretation thereof.

(b) Said regulation is inapplicable to the situation here presented because there is no authority for its promulgation, particularly since it bears no reasonable relationship to health or safety or public welfare.

(c) Said regulation is inapplicable because the testimony adduced before the Board of Appeals and Review is uncontraverted and undisputable that there are present no factors of safety or health or public welfare.

(d) Said regulation is not applicable because the 1957 Electrical Code does not require by its terms that either telephone or TV antenna lines be enclosed in metal conduits; in fact such lines may be run fastened to walls or molding in any manner desired by the owner of the premises involved; or they may be run together or separately without being enclosed in such metal conduits.

(e) Said regulation is also inapplicable because by custom and practice in the District of Columbia, neither permits were or are required for the installation of such lines, nor have inspections been required after such work has been installed in the past; and the plaintiffs relied upon such custom and practice in the installation of the TV antenna lines involved herein.

(f) Said section is ambiguous and in conflict with other sections of the 1957 Electrical Code, because for all practical purposes light, heat or power are not involved in the work installed and involved herein.

(g) The interpretation and construction placed upon Article 810, Section 8123.2 of the 1957 Electrical Code by the defendants and their subordinates is grossly inequitable, unreasonable and without basis,

either in reason or in law; neither the electrical industry nor the public, before the instant case, have ever been apprised of the construction and interpretation now being contended for by the District of Columbia under the circumstances here presented; and never prior to the instant proceedings has the District of Columbia construed the provision of the Code above cited to be applicable to the circumstances presented herein.

(h) The interpretation and construction placed upon said section of the Electrical Code is illegal and unwarranted; there is neither danger nor hazard to life or property involved; nor is there any corresponding benefit either to the owner of the building, the tenants thereof, or to the public.

WHEREFORE, the premises considered, plaintiffs pray:

(1) That this Court reverse, revoke, rescind and set aside the decision of the District of Columbia Board of Appeals and Review;

(2) That the Court reverse, rescind, revoke, set aside, and hold for naught an order of the Chief of the Electrical Section of the District of Columbia dated September 20, 1960;

(3) That this Court enter a declaratory judgment against the defendants and their subordinates so as to order and decree that Article 810, Section 8123.2 of the 1957 Electrical Code is not applicable to the circumstances herein presented; or, alternatively, that the interpretation placed upon said section by the Board of Appeals and Review and the Chief of the Electrical Section be held to be erroneous, illegal, and unwarranted;

(4) That this Court declare, in the alternative, the action of the defendants in promulgating said Section 8123.2 of the 1957 Electrical Code to be arbitrary, capricious, illegal and void;

(5) That this Court issue a preliminary, temporary and permanent injunction restraining and enjoining the defendants and any and all employees of the District of Columbia, directly or indirectly, or in any other manner whatsoever from construing, interpreting or

enforcing the provisions of said Section 8123.2 of the 1957 Electrical Code against either or both of the plaintiffs, under the circumstances involved herein;

(6) That this Court issue a mandatory injunction compelling the defendants to set aside, revoke and rescind said Section 8123.2 of the 1957 Electrical Code;

(7) And for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

/s/ Robert A. Harris
ROBERT A. HARRIS

RIGGS INVESTMENT CORPORATION
By:

/s/ John F. Brawner
JOHN F. BRAWNER, Agent

/s/ Maurice Friedman
Maurice Friedman
1001 Connecticut Avenue, N.W.
Washington 6, D.C.
Attorney for Plaintiffs

DISTRICT OF COLUMBIA ss:

I, Robert A. Harris, being first duly sworn, depose and say that I am one of the plaintiffs in the foregoing Complaint by me subscribed, and that I verily believe the contents thereof to be true.

/s/ Robert A. Harris
ROBERT A. HARRIS

Subscribed and sworn to before me this 16th day of May, 1961.

/s/ Thelma E. Cosby
Notary Public, D.C.
Commission Expires 3/14/66

DISTRICT OF COLUMBIA ss:

I, John F. Brawner, being first duly sworn, depose and say that I am an officer of Riggs Investment Corporation, one of the plaintiffs named in the foregoing Complaint by me subscribed, and that I verily believe the contents thereof to be true.

/s/ John F. Brawner
JOHN F. BRAWNER

Subscribed and sworn to before me this 16th day of May, 1961.

/s/ Mary V. Ritchey
Notary Public, D.C.
Commission Expires 2/1/64

[Filed June 7, 1961]
[Received June 9, 1961]

**MOTION OF DEFENDANTS TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT**

The defendants move the Court to dismiss the above entitled cause or, in the alternative, to grant summary judgment on the grounds that:

1. The complaint fails to state a claim against the defendants upon which relief can be granted.
2. The complaint, when considered with the exhibits, "A" to "D", attached hereto and made a part hereof by reference, demonstrate that there is no genuine issue as to any material facts and that the defendants are entitled to summary judgment in their favor.

/s/ Chester H. Gray
CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ John A. Earnest
JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ John F. Middleton
Assistant Corporation Counsel, D.C.
Attorneys for Defendants
Washington 4, D.C.

AFFIDAVIT

[Filed June 7, 1961]

DISTRICT OF COLUMBIA, SS:

I, JOHN K. BURCH, being duly sworn, depose and say that I am Foreman, Service, for The Chesapeake and Potomac Telephone Company; that in the latter part of June or first part of July, 1960, Herbert F. Reilly, Repairman, reported to me that he had received a shock at the premises 5601-5609 Second Street, N.E., where the Company had installed telephone wires in a conduit and that there were television lead-in wires in this conduit; that I went with Mr. Reilly to test the premises where I observed the television lead-in wires in the telephone conduit; that around the middle of July, 1960, I saw a man whose name I do not know but whom I then, and now, believed to be an inspector for the Department of Licenses and Inspections and reported to him the location of television wires in the telephone conduit; that the inspector suggested I call Mr. John W. Lewis, Chief - Electrical Section; that I called Mr. Lewis and after several telephone conversations I advised him that I wished to make a formal complaint; that on or about August 23, 1960, Bernard J. Smith, Electrical Inspector from the Division of Inspections, Department of Licenses and Inspections, accompanied me upon a visit to the premises where he personally observed the location of the telephone conduit and the television serial and lead-in wires.

/s/ John K. Burch

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of May, 1961.

/s/ Genevieve M. Brozick
Notary Public

My commission expires June 14, 1965.

AFFIDAVIT

DISTRICT OF COLUMBIA:

I, HERBERT F. REILLY, being duly sworn depose and say that I am an Installer-Repairman for The Chesapeake and Potomac Telephone Company; that in the latter part of June or the first part of July, 1960, while on a repair call to the premises at 5601-5609 Second Street, N.E., Washington, D.C., I received an electrical shock from the conduit in which telephone wires had been installed; that at the time of receiving this electrical shock I was standing on a concrete floor and I was in contact with no other equipment except the conduit; that I then observed a television antenna lead-in wire entering the conduit and that I then reported to Mr. John K. Burch, Foreman-Service for The Chesapeake and Potomac Telephone Company, the existence of the television antenna wire in the conduit and that I had received a shock from this conduit.

/s/ Herbert F. Reilly

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 26th day of May, 1961.

/s/ Genevieve M. Brozick
Notary Public

My commission expires June 14, 1965.

EXHIBIT C

AFFIDAVIT OF JOHN W. LEWIS

[Filed June 7, 1961]

DISTRICT OF COLUMBIA, ss:

I, JOHN W. LEWIS, being duly sworn, depose and say that I am Chief, Electrical Section, Department of Licenses and Inspections, D.C.; that on August 31, 1960, I received a complaint from John K. Burch, Telephone Service Foreman, Chesapeake and Potomac Telephone Company, who stated that the Electrical Associates, an electrical

contractor in the District of Columbia, had installed antenna and/or lead-in wires in the conduit which housed telephone conductors at 5601-09 2nd Street, N.E., and also that one of his repairmen received an electrical shock while he was working on these telephone conductors; that I contacted Mr. R.A. Harris, owner of Electrical Associates, and asked him to get in touch with Mr. Burch in order to work out a solution to their problem; that this procedure is the normal one taken in complaints of this nature so that such problems can be worked out without the intervention of the District of Columbia government; that in September, 1960, after Mr. Harris refused to cooperate in working out a solution for this problem with Mr. Burch, I went to the subject premises with Mr. Bernard J. Smith, Electrical Inspector, Department of Licenses and Inspections, D.C., and saw that the antenna lead-ins had been installed in the manner complained of; that Mr. Harris told me that his company had installed these antenna and/or lead-inwires after the telephone wires had been installed; that on September 29, 1960, a violation notice was sent to the Electrical Associates informing them that they were in violation of Article 810, Section 8123.2, of the D.C. Electrical Code and to correct said violation within thirty (30) days of receipt of the notice; that on October 20, 1960, I appeared before the Board of Appeals and Review as a witness for the District of Columbia and testified to the above mentioned facts.

/s/ John W. Lewis
JOHN W. LEWIS

Subscribed and sworn to before
me this 7th day of June, 1961.

/s/ Adam A. Giebel
NOTARY PUBLIC

My commission expires August 31, 1964.

AFFIDAVIT OF BERNARD J. SMITH

[Filed June 7, 1961]

DISTRICT OF COLUMBIA, ss:

I, BERNARD J. SMITH, being duly sworn, depose and say that I am an electrical inspector, Electrical Section, Department of Licenses and Inspections, D.C.; that on August 27, 1960, upon being handed a complaint of a possible violation of the Electrical Code at 5601-09 2nd Street, N.E., I proceeded to the subject premises to inspect same; that I was joined there by John K. Burch and one other representative of the Chesapeake and Potomac Telephone Company; that upon investigation I discovered that several existing telephone conduits had co-axial antenna cable installed in the same one-half inch raceways that enclosed the telephone cables, which is in violation of Article 810, Section 8123.2, of the D.C. Electrical Code; that on September 29, 1960, a defect letter was sent to Mr. R.A. Harris who installed the above mentioned Code violation; that a copy of the aforementioned letter was sent to Mr. Burch of the Chesapeake and Potomac Telephone Company and Waggam & Browner Realty Company which owns the subject premises; that on October 20, 1960, I appeared before the Board of Appeals and Review as a witness for the District of Columbia and testified to the above mentioned facts.

/s/ Bernard J. Smith

BERNARD J. SMITH

Subscribed and sworn to before
me this 7th day of June, 1961

/s/ Adam A. Giebel

NOTARY PUBLIC

My commission expires August 31, 1964

STATEMENT OF MATERIAL FACTS AS TO WHICH
THE DEFENDANTS CONTEND THERE IS NO
GENUINE ISSUE

[Filed June 8, 1961]

[Received June 9, 1961]

Come now the defendants and in support of their motion to dismiss or in the alternative for summary judgment state that the following are material facts as to which there is no genuine issue:

1. That at some date prior to September, 1960, the plaintiff Robert A. Harris installed television lead-in wires in a one-half inch metal raceway occupied by telephone wires at premises 5601-5609 2nd Street, N.E., under contract with the plaintiff Riggs Investment Corporation.

2. During the latter part of June or the first part of July, 1960, H. F. Reilly, an employee of the Chesapeake and Potomac Telephone Company, after receiving an electrical shock therefrom, discovered that the antenna lead-ins had been placed within the subject metal raceway.

3. During the latter part of June or first part of July, 1960, John K. Burch, upon receiving the above report from Mr. Reilly, lodged a formal complaint with John W. Lewis, Chief, Electrical Section, Department of Licenses and Inspections, D.C.

4. On August 23, 1960, Mr. Lewis along with Bernard J. Smith, Electrical Inspector, Department of Licenses and Inspections, D.C., met Mr. Burch at the subject premises where each of them observed the condition complained of.

5. On September 29, 1960, after an unsuccessful attempt at a settlement of this problem between the plaintiff Harris and the Telephone Company, Mr. Lewis sent a violation notice to the plaintiff Harris' company informing it that it was in violation of Article 810, Section 8123.2, of the D.C. Electrical Code and requested compliance therewith within thirty (30) days.

6. On October 11, 1960, the plaintiff Harris appealed to the Board of Appeals and Review which held hearings in the matter on

October 20, 1960 and February 23, 1961. Testimony on behalf of all parties was presented at these hearings.

7. On March 16, 1961, the Board of Appeals and Review notified the plaintiff Harris that it had found that he was in violation of Article 810, Section 8123.2 of the 1957 Electrical Code and that the action of the Department of Licenses and Inspections was being sustained by the board.

8. On March 17, 1961, the plaintiff Harris filed a motion with the said board for a reconsideration of its decision.

9. On April 20, 1961, a committee of the said board notified plaintiff Harris that he had failed to show good cause, or exceptional circumstances, which would warrant rescission or reconsideration of the board's prior decision, and denied plaintiff's request for rescission of the prior order.

10. On May 17, 1961, the plaintiff Harris and the plaintiff Riggs Investment Corporation filed in this Court a "COMPLAINT TO SET ASIDE DECISION OF THE DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW, FOR DECLARATORY JUDGMENT AND INJUNCTION" against the Board of Commissioners, D.C.

/s/ Chester H. Gray
CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ John A. Earnest
JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ John F. Middleton
JOHN F. MIDDLETON
Assistant Corporation Counsel, D.C.
Attorneys for Defendants
District Building
Washington 4, D.C.

[CERTIFICATE OF SERVICE]

PLAINTIFFS' STATEMENT OF GENUINE ISSUES

[Filed June 15, 1961]

Plaintiffs state that genuine issues exist which are necessary to be litigated on the basis of the following material facts:

1. That the installation by the plaintiff Robert A. Harris of television lead-in antenna lines in the metal conduits owned by the plaintiff, Riggs Investment Corporation, was performed in a competent and workmanlike manner, and in compliance with the D.C. Electrical Code.
2. That the Electrical Code does not require either telephone lines or TV antenna lines to be installed in a metal conduit.
3. That telephone lines and TV antenna lines may be run in an open fashion, that is, not in a metal conduit, within less than two inches of each other, in compliance with the D.C. Electrical Code.
4. That Section 8123.2 of the D.C. Electrical Code, if construed to prevent the installation here involved, is unreasonable, arbitrary or capricious.
5. Section 8123.2 of the D.C. Electrical Code, or the defendants' construction or interpretation thereof, does not promote, and bears no reasonable relationship to public health, safety or general welfare, and is therefore erroneous.
6. Section 8123.2 of the D.C. Electrical Code is discriminatory, ambiguous and in conflict with other provisions of said Electrical Code.
7. The defendants and their subordinates are estopped from asserting that Section 8123.2 of the D.C. Electrical Code prohibits the installation involved herein.

/s/ Maurice Friedman
Maurice Friedman
1001 Connecticut Ave., N.W.
Washington 6, D.C.

Attorney for Plaintiffs

[CERTIFICATE OF SERVICE]

MOTION FOR RECONSIDERATION

[Filed July 11, 1961]

The plaintiffs respectfully move the Court to reconsider the defendants' motion to dismiss or for a summary judgment, and for reasons therefor, refer to the Affidavit and Memorandum attached hereto in support of said motion.

Respectfully submitted,

/s/ Maurice Friedman
Maurice Friedman
1001 Connecticut Avenue, N.W.
Washington 6, D.C.

Attorney for Plaintiffs

[CERTIFICATE OF SERVICE]

AFFIDAVIT OF PLAINTIFF

[Filed July 11, 1961]

DISTRICT OF COLUMBIA ss:

I, ROBERT A. HARRIS, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled cause; that I have read the affidavit of Herbert F. Reilly attached to and filed in support of the defendant's motion to dismiss, or in the alternative, for summary judgment; that said Herbert F. Reilly is the same witness who testified at the hearing before the District of Columbia Board of Appeals and Review in this case; that the substance of his testimony at that time was more complete and specific than his affidavit filed herein; that said Herbert F. Reilly testified before the Board of Appeals and Review in substance as follows: That in July of 1960, he had been detailed to call at premises 5601-5609 - Second Street, N.E., on a repair call as a result of receiving a complaint from a telephone subscriber; that he

went to the basement of the building where he came in contact with a metal conduit which he touched and received a slight shock; that he noticed some moisture or condensation on the metal conduit, which he attributed as the probable cause of the static shock he received; but that he certainly did not intend to convey the idea or impression that the static shock he received was in any way attributable to the fact that the metal conduit contained both telephone lines and TV antenna lines; that he thereupon went to the apartment of the complaining subscriber, where he discovered that the telephone line across a threshold in the apartment was exposed and this was the cause of the complaint.

I am prepared to establish beyond any doubt whatsoever that there is not even a remote possibility of any danger or hazard in the installation involved herein; that is, by running the telephone line and TV antenna lead-in line in the same metal conduit or raceway; and the static shock which the witness, Herbert F. Reilly, testified to was in no way, directly or indirectly, related to or caused by the existence of the above-described installation.

The hearings before the Board of Appeals and Review in this case were recorded by means of a recording machine; and I have attempted to run the records so as to transcribe the recording to a tape for the purpose of preparing a typewritten transcription of said hearings; that I found that the testimony recorded at the hearings on the occasion of two of the three hearings which were held was unintelligible, either because the recording was defective or because, since the testimony was originally recorded, other sounds have been introduced into the recording so as to make them unintelligible. The only recording which was intelligible was that of the third hearing devoted only to argument of counsel and comments of the board members.

I am informed that my attorney had previously requested that the Board of Appeals and Review furnish a transcript of the testimony of these hearings, but that no such transcript has been furnished, although an offer was made to permit me to re-record the material on

my own tape recorder for eventual transcribing. During my visit to the District Building for the purposes of transcribing or re-taping the recorded proceedings, I understood Mr. Haller, the Secretary to the Board of Appeals and Review, to say that the recordings had previously been transcribed.

I believe that it is necessary for a proper understanding of this case that the Court should have an opportunity to review the testimony by examining a copy of the transcript of the hearing before the Board of Appeals and Review; otherwise, I believe that I will be deprived of my right to a full and fair hearing and review of the action of said Board.

/s/ Robert A. Harris
ROBERT A. HARRIS

Subscribed and sworn to before me this 10th day of July, 1961.

/s/ Marjlyn J. Blanchette
Notary Public, D.C.
5/14/66

MOTION TO DISMISS OR
For Summary Judgment Argued and Summary
Judgment Granted - July 5, 1961

O R D E R

[Filed July 17, 1961]

This cause came on before the Court on the defendants Walter H. Tobriner, Robert A. McLaughlin and Frederick S. Clarke's motion to dismiss or, in the alternative, for summary judgment, and,

upon consideration thereof and the opposition thereto, and oral argument by counsel for plaintiffs and for the defendants in open court, and it appearing to the Court that there is no genuine issue as to any material fact and that the defendants are entitled to summary judgment, it is this 17th day of July, 1961.

ORDERED: That the motion for summary judgment be and the same is hereby granted.

/s/ Edward A. Tamm
JUDGE

[CERTIFICATE OF SERVICE]

NOTICE OF APPEAL

[Filed July 31, 1961]

Notice is hereby given this 31st day of July, 1961, that the plaintiffs in the above-entitled cause, Robert A. Harris and Riggs Investment Corp., a body corporate, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of July, 1961 in favor of the Defendants, Walter N. Tobriner, Robert A. McLaughlin and Brig. Gen. F.S. Clarke against said Plaintiffs, Robert A. Harris and Riggs Investment Corp.

/s/ Maurice Friedman
Robert A. Harris and
Riggs Investment Corp.
Plaintiffs

[CERTIFICATE OF SERVICE]

[Filed October 31, 1961]

ORDER

Upon consideration of the motion of plaintiffs to reconsider the defendants' motion to dismiss or in the alternative for summary judgment, and the affidavit and memorandum filed in support thereof, it is by the Court this 31st day of October, 1961,

ORDERED, that the plaintiffs' motion for reconsideration be, and the same is, hereby denied.

/s/ Edward A. Tamm

JUDGE

I hereby certify that copy of the foregoing was mailed, postage prepaid, to Maurice Friedman, Attorney for Plaintiffs, 1001 Connecticut Ave., N.W., Washington 6, D. C., this 24th day of October, 1961.

/s/ JOHN F. MIDDLETON
Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building
Washington 4, D.C.

[Filed November 2, 1961]

NOTICE OF APPEAL

Notice is hereby given this 2nd day of November, 1961, that the plaintiffs in the above-entitled cause, Robert A. Harris and Riggs Investment Corp., a body corporate, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of October, 1961, and from the judgment of this Court entered on the 17th day of July, 1961, in favor of the Defendants, Walter N. Tobriner, Robert A. McLaughlin, and Brig. Gen. F. S. Clarke, against said Plaintiffs, Robert A. Harris and Riggs Investment Corp.

/s/ Maurice Friedman,
Attorney for Robert A. Harris
and Riggs Investment Corp.,
Plaintiffs
1001 Connecticut Avenue, N.W.
Washington 6, D. C.

BRIEF FOR APPELLEES

**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

Nos. 16, 617
and 16, 710

ROBERT A. HARRIS, et al.,

Appellants,

v.

WALTER N. TOBRINER, et al.,

Appellees.

**Appeal From The United States District Court
For The District Of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 19 1962

Joseph W. Stewart
CLERK

**CHESTER H. GRAY,
Corporation Counsel, D. C.**

**MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.**

**HUBERT B. PAIR,
Assistant Corporation Counsel, D. C.**

**RICHARD W. BARTON,
Assistant Corporation Counsel, D. C.**

**Attorneys for Appellees,
District Building,
Washington 4, D. C.**

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees, the questions presented are:

1. Does not the Electrical Code of the District of Columbia, which provides, with exceptions not here applicable, that " * * * [i]ndoor antennas and indoor lead-ins shall not be run nearer than two inches to conductors or other wiring systems * * *" in any premises, prohibit the installation of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires?

2. Does not such provision of the Electrical Code bear a reasonable relationship to the protection of the public health, safety, and general welfare?

I N D E X

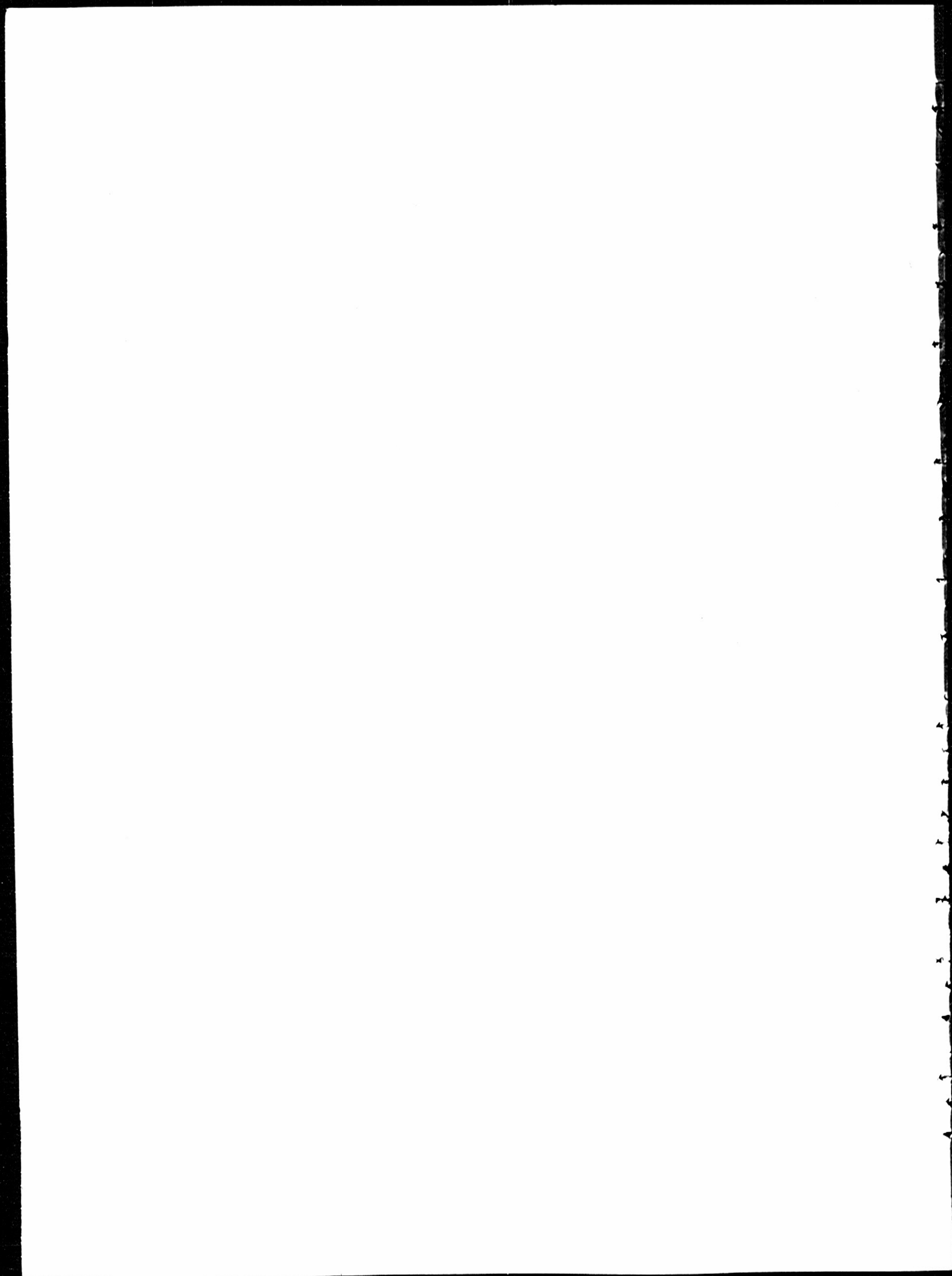
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

ROBERT A. HARRIS, et al.,	:	
	:	
Appellants,	:	
	:	
v.	:	Nos. 16,617
	:	and 16,710
WALTER N. TOBRINER, et al.,	:	
	:	
Appellees.	:	

COUNTER-STATEMENT OF THE CASE

Appellant Riggs Investment Corporation owns a multiple family apartment building in the District of Columbia. During the construction of the building, one-half inch metal conduits leading to each apartment therein were installed. The Chesapeake and Potomac Telephone Company was permitted by the owner to utilize these conduits for running telephone wires into the various apartments (J. A. 2-3, 13).

Some time later, appellant Harris, a licensed electrical contractor, was employed by the owner to install in the building a master television antenna system. Lead-in wires from the master television antenna were installed by appellant Harris in the same conduits which carried the telephone wires into the various apartments (J. A. 2-3).

Following a complaint by the telephone company and an inspection of the conduits by employees of the Electrical Section of the District of Columbia Department of Licenses and Inspections, the Chief of the Electrical Section notified appellant Harris that the running of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires is a violation of Article 810, Section 8123.2, of the District of Columbia Electrical Code and ordered him to correct the unlawful condition (J. A. 4).

Pursuant to D. C. Code, 1961, Title 1, Administration, Appendix, Organization Order No. 112, page 140, appellant Harris appealed to the Board of Appeals and Review. Following extensive hearings, the Board of Appeals and Review found that the running of television antenna lead-in wires in the same conduits with telephone wires " * * is a clear violation of Article 810, Section 8123.2 of the 1957 Electrical Code" and sustained the action of the Department of Licenses and Inspections in ordering appellant Harris to correct the condition (J. A. 4-5).

Appellants then filed in the District Court a complaint against the Commissioners of the District of Columbia seeking a declaratory judgment that Article 810, Section 8123.2, of the Electrical Code does not prohibit the running of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires or that, if it does, the Commissioners

are without authority to promulgate the regulation because, allegedly, it bears no reasonable relationship to the promotion of the public health, safety, or general welfare. Appellants sought also mandatory injunctive relief (J. A. 2-8).

Appellees moved, with supporting affidavits, for summary judgment (J. A. 9-13) and, as required by Rule 9 (h) of the District Court's Rules, filed a statement of material facts (substantially what is hereinbefore set forth) as to which, they contended, there was no genuine issue (J. A. 14-15). Appellants then filed a statement of genuine issues which they contended were necessary to be litigated (J. A. 16). Appellants' statement did not controvert any fact set forth in appellees' statement but, instead, raised issues of law (J. A. 16).

Following a hearing on July 5, 1961, the District Court, having concluded that there existed no genuine issue as to any material fact and that appellees were entitled to judgment as a matter of law, indicated it would grant their motion for summary judgment (J. A. 19-20).

On July 11, 1961, appellants filed a motion for reconsideration and attached thereto an affidavit of appellant Harris. In his affidavit appellant asserted, for the first time, that he had attempted unsuccessfully to obtain from the Board of Appeals and Review a copy of the transcript of the

hearings before it and that he believed that, unless the court was given an opportunity to examine the transcript, he would " * * * be deprived of [his] right to a full and fair hearing and review of the action of said Board" (J. A. 17-19).

On July 17, 1961, the District Court entered an order granting summary judgment for appellees (J. A. 19-20) and on July 31, 1961, appellants filed a notice of appeal from such judgment (J. A. 20). On October 31, 1961, appellants' motion for reconsideration was denied (J. A. 2) and on November 2, 1961, they filed a new notice of appeal from both the order of July 17, 1961, granting summary judgment and the order of October 31, 1961, denying their motion for reconsideration (J. A. 21).

SUMMARY OF THE ARGUMENT

Since the Commissioners of the District of Columbia, in promulgating Article 810, Section 8123.2, of the Electrical Code, did not qualify the words "conductors or other wiring systems" by words limiting their application to conductors or other wiring systems carrying electricity for light and power (as they did in numerous other sections), it is clear that such section prohibits the installation of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires.

Article 810, Section 8123.2, of the Electrical Code, designed as it is to protect the inhabitants of the District of Columbia from powerful and potentially lethal electrical shocks which might result from the improper connection of television lead-in wires to television sets, clearly bears a reasonable relationship to the protection of the public health, safety, and general welfare.

ARGUMENT

The court below did not err in granting summary judgment for appellees.

It was undisputed below and it is undisputed here that appellant Harris installed in one-half inch metal conduits carrying telephone wires television antenna lead-in wires. In their complaint appellants alleged (1) that such installation is not, as found by the Board of Appeals and Review, a violation of Article 810, Section 8123.2, of the Electrical Code and (2) that, if it is, the Commissioners of the District of Columbia were without authority to promulgate the regulation because it bears no reasonable relationship to the promotion of the public health, safety, or general welfare.

In granting summary judgment for appellees, the court below found, as to both of appellants' contentions, that there existed no genuine issue

as to any material fact and that appellees were entitled to judgment as a matter of law.

Article 810, Section 8123.2, of the Electrical Code provides:

Indoor antennas and indoor lead-ins shall not be run nearer than two inches to conductors or other wiring systems in the premises unless (1) such other conductors are in metal raceways or cable armor, or (2) unless permanently separated from such other conductors by a continuous and firmly fixed non-conductor such as porcelain tubes or flexible tubing.

1

As to their contention that the installation of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires is not a violation of the Electrical Code, appellants apparently concede that there exists no material issue of fact. They argue, however, that the issues of law were incorrectly resolved by the lower court.

Appellants contend in this connection that the words "conductors or other wiring systems" in Article 810, Section 8123.2, have reference only to conductors or wiring systems carrying electricity for light and power and not to telephone wiring systems. They point out that the Electrical Code does not require either television antenna lead-in wires or telephone wires to be enclosed in metal conduits, nor does it require a permit for

their installation. They point out also that various other provisions of the Electrical Code prohibit the running of telephone, telegraph, radio, and communication conductors in the same enclosure with or in proximity to electric light and power conductors. Appellants reason from this that the Commissioners of the District of Columbia, in promulgating Article 810, Section 8123.2, could not have intended, notwithstanding the clear and unambiguous language used, to prohibit the installation of television antenna lead-in wires in the same one-half inch metal conduits with telephone wires.

It is, however, clear from the various provisions of the Electrical Code quoted on pages 15, 16 and 17 of appellants' brief (as well as others) that where the Commissioners intended the words "conductors" and "wiring systems" to refer only to conductors or wiring systems carrying electricity for light and power they have plainly so indicated by the use of such expressions as: "wiring * * * for electric light, heat or power purposes," "electrical systems," "conductors of light or power systems," "conductors of electric light and power circuits," "light or power conductors," "conductors for light and power circuits," etc.

The failure of the Commissioners to use some such expression in connection with the words "conductors or other wiring systems" in

Article 810, Section 8123.2, is a clear indication that they did not intend to limit such words to conductors or other wiring systems carrying electricity for light and power. On the contrary, the only reasonable interpretation that can be placed on the words used is that they were intended to apply to all conductors and wiring systems, including, of course, telephone wiring systems.

As to appellants' contention that the Commissioners of the District of Columbia are without authority to promulgate Article 810, Section 8123.2, of the Electrical Code because it bears no reasonable relationship to the promotion of the public health, safety, or general welfare, they assert that there exist genuine issues of fact which it is necessary to litigate. Appellants say that, if they had been permitted to present evidence, they could have established that the running of television antenna lead-in wires and telephone wires in the same one-half inch metal conduits does not present a hazard of sufficient magnitude to require regulation.

Appellants argue that both television antenna lead-in wires and telephone wires " * * * have such a minute energy output that it is measured in microvolts" and that " * * * the total energy output of both is so infinitesimal as to be practically non-existent * * *." Appellants seek

to establish from this that no possible hazard can arise from the running of television antenna lead-in wires and telephone wires in the same one-half inch metal conduits. This may be conceded as true, provided such television antenna lead-in wires are affixed to television sets in the manner directed by the manufacturer. It is, however, so well known that this Court may take judicial notice thereof (as the court below undoubtedly did) that television sets carry powerful and potentially lethal charges of electricity. If an incompetent repairman or a do-it-yourself television set owner improperly affixes a television antenna lead-in wire to a television set in such a manner that the electrical charge carried by the set is conducted therefrom by the antenna lead-in wire and such lead-in wires comes in contact with or in close proximity to a telephone wire it is not only possible but highly probable that telephone callers, not only in the same building but in other buildings, may receive a powerful and perhaps lethal electrical shock. While the possibility of this happening may, admittedly, be somewhat remote, it is nevertheless a hazard which the Commissioners may properly seek to prevent, as they did by promulgating Article 810, Section 8123.2, of the Electrical Code. Surely it cannot be reasonably argued that the Commissioners are without authority to promulgate a regulation designed to protect, and which does protect, the inhabitants of the District of Columbia from such a contingency.

In 11 Am. Jur., Constitutional Law, § 305, it is said:

The discretion of the legislature is very large in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests. In fact the courts often state that within constitution limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people and as to when and how the police power of the state is to be exercised. * * *

Plainly, the Commissioners of the District of Columbia had explicit authority to promulgate Article 810, Section 8123.2, of the Electrical Code, both under D. C. Code, 1961, § 1-719, relating to electrical wiring and under D. C. Code, 1961, § 1-226, empowering them " * * to make and enforce all such reasonable and usual police regulations * * * as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia. "

Moreover, aside from the question of possible hazard to health or safety, the Commissioners, under D. C. Code, 1961, § 1-226, could lawfully prohibit the running of television antenna lead-in wires and telephone wires in the same one-half inch metal conduits as a means of preventing possible sonic interference with telephone reception.

Appellants contend finally that because they were not furnished a stenographic transcript of the hearings before the Board of Appeals and Review, it was "* * * incumbent upon the lower court to grant a de novo hearing and to afford appellants a full opportunity to establish their right to relief from the action taken by the District and the Board." This may be a correct statement of the law, but it is without application here. The right to a trial de novo does not preclude the granting of summary judgment if otherwise appropriate. Appellees did not seek in the lower court to sustain their action on the basis of the record before the Board of Appeals and Review. Indeed, no part of such record was before the District Court. The cases cited by appellants in Part III of their brief are, accordingly, not relevant to the questions presented here. Moreover, no issue concerning the transcript was presented to the District Court at the time the case was heard and decided. It was not until appellants filed their motion for reconsideration that they, for the first time, raised any issue concerning the transcript.

CONCLUSION

Upon the foregoing it is respectfully submitted that the District Court did not err in granting summary judgment for appellees. Accordingly, its judgment should be affirmed.

CHESTER H. GRAY,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.

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